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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,
Petitioners,
v.
LIBERTY LOBBY, INC., and WILLIS A. CARTO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE THE AMERICAN LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

DANIEL J. POPEO *
MICHAEL P. McDONALD
AMERICAN LEGAL FOUNDATION
1705 N Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 857-0400
Attorneys for Amicus Curiae American Legal Foundation

* Counsel of Record

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QUESTION PRESENTED

Whether, in order to deny a defendant's motion for summary judgment in a public figure libel action, the trial court judge must conclude that a reasonable jury not only could find the existence of actual malice, but could find that it had been established with convincing clarity.

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BRIEF OF AMICUS CURIAE THE AMERICAN LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICUS CURIAE

The American Legal Foundation ("ALF" or "Foundation") is a national, non-profit, public interest legal center organized and existing under the laws of the District of Columbia for the purpose of articulating the broad public interest in courtroom litigation and administrative proceedings affecting the communications media. ALF currently represents the interests of over 40,000 supporters who reside throughout the United States. This brief is filed with the written consent of all parties, pursuant to Supreme Court Rule 36.1.

The Foundation is dedicated to ensuring that the media act in a fair and responsible manner in reporting news and information to the public. In this regard, ALF has directed much of its media litigation efforts to challenging inaccurate news broadcasts and to assisting individuals defamed by the media.

For example, ALF has prosecuted a variety of administrative complaints at the Federal Communications Commission seeking sanctions against government-licensed broadcasters who air false, defamatory or otherwise distorted news reports that deceive the viewing public. *See, e.g., In re Complaint of American Legal Foundation v. Columbia Broadcasting System, Inc.*, FCC File No. Cl-515, *Application for Review by the Full Commisison filed*, March 4, 1985 (presenting evidence to the Commission demonstrating that the CBS documentary, "The Uncounted Enemy: A Vietnam Deception," deliberately distorted and suppressed information in order to create the false impression that General William C. Westmoreland led a conspiracy to falsify enemy troop numbers during the Vietnam War); and *In re Complaint of American Legal Foundation/Central Intelligence Agency v. American Broadcasting Company, Inc., Report* No. MM-53, *Request for Full Commission Review denied*, July 12, 1985 (involving fairness doctrine/news distortion complaints filed in connection with "ABC World News Tonight" segments falsely alleging CIA participation in unlawful schemes to assassinate American citizens).

Over the past three years, ALF has also increasingly turned its attention to libel litigation as one major aspect of its media fairness agenda. The Foundation has been involved in a number of important libel suits in differing capacities (co-counsel, of counsel, *amicus curiae*). These include: *Galloway v. CBS, Inc.*, No. C 345900 (L.A. Super. 1983) (private figure action against "60 Minutes" news program concerning report on medical insurance

fraud); *Tavoulareas v. Washington Post*, No. 83-1605 (D.C. Cir. Apr. 9, 1985), *reh'g en banc granted* (June 11, 1985) (business executive's suit over newspaper's allegations of financial mismanagement and corporate nepotism); *Janklow v. Viking Press, et al.*, No. 14657, *argued* Jan. 9, 1985 (S.Ct. S.D.) (suit by South Dakota Governor raising neutral reportage privilege); and *Lewis, et al. v. Port Packet*, 325 S.E.2d 713 (Va. 1985), *petition for cert. denied*, 53 U.S.L.W. 3911 (U.S. July 1, 1985) No. 84-1723 (private figure libel action concerning standard of proof prerequisite to punitive damage award).

In addition to the Foundation's regular participation in libel litigation, ALF has also established the nation's only existing Libel Prosecution Resource Center to assist victims of media defamation in suits against the press. Postell, *News Media Under Scrutiny in the '80s*, Trial Magazine, February, 1985 at 72-73. The Center, which began operation in August, 1984, offers a collection of sample briefs, complaints and other types of libel-related pleadings and materials to interested individuals. In addition to serving as a libel information clearinghouse, the ALF Center has also published original legal studies on various aspects of defamation law. *See* B. Fein, New York Times v. Sullivan: *An Obstacle to Enlightened Public Discourse and Government Responsiveness to the People* (American Legal Foundation, No. 1, 1984).

Finally, working through its Libel Center, ALF has succeeded in organizing a network of libel plaintiffs' attorneys in approximately 40 states who accept referrals from the Foundation when requests for legal assistance are received by potential libel plaintiffs situated in their locality.

Thus ALF's expertise in libel law is well documented. The Foundation has expended an enormous amount of time, effort and money to assist libel plaintiffs in the belief that the public interest is ill served by a legal

system that effectively renders both private and public figures powerless to protect their good names against unjust media defamation.

The constitutional issues presented in the instant proceeding directly implicate these concerns. Simply stated, petitioners seek to deprive public figure libel plaintiffs of the right to have their cases decided by a jury. They seek to do this by urging this Court to introduce the "clear and convincing evidence" constitutional standard of proof at the summary judgment stage of litigation—the result of which would be effectively to replace trial by jury with "trial by affidavits." *Cf., Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (Black, J., concurring).

No matter how they attempt to present it, petitioners' arguments, if adopted, would constitute an unjustified restructuring of the summary judgment procedure normally available to litigants in civil cases. Public figure libel plaintiffs would henceforth be compelled to try their entire case in pretrial affidavits and depositions with little, if any, hope of eventually getting to trial. Moreover, trial court judges would be vested with a constitutional prerogative to assume traditional jury functions on the basis of little more than speculative claims of "chilling effect".

The central fact to be recognized is that petitioners are arguing for the establishment of special procedural protections in public figure libel cases in addition to already existing substantive constitutional protections mandated by *New York Times v. Sullivan* and its progeny. However, by shielding the media any further from liability—or in this case, the mere threat of potential liability—for either recklessly or intentionally disseminating false and defamatory factual information about public figures, the Court would, in fact, be granting the communications media absolute immunity from suit.

Although the First Amendment concerns to be addressed in this case are important, so too are the conflicting reputational interests. Petitioners and their eighteen supporting amici have come before this Court to stress the latter at the expense of the former. By articulating why the public interest demands heightened judicial concern for the value of an individual's reputation, ALF hopes to redress this argumentative imbalance and thereby assist the Court in reaching an informed judgment in the specific matter *sub judice*.

Accordingly, the American Legal Foundation believes it is urgently important for this Court to affirm the holding of the United States Court of Appeals for the District of Columbia that it is inappropriate to apply the clear and convincing evidence standard at the summary judgment stage of a public figure libel action.

STATEMENT OF THE CASE

In the interests of brevity, *amicus curiae* adopts the statement of the case set forth in the brief of Respondents.

SUMMARY OF ARGUMENT

1. An unbroken line of judicial precedents has firmly established that summary judgment is a drastic procedural remedy which should not be employed by courts to deprive litigants of their Seventh Amendment right to trial by jury when material facts are in dispute. In this regard courts must scrupulously avoid assuming the jury function by, for example, weighing the materiality of the facts in dispute.

When cases arise centering around state of mind determinations summary judgment should be even more sparingly employed. State of mind issues are best resolved by the finder of fact, that is, the jury. Given that a public figure libel action must inevitably focus on the

state of mind of the libel defendants in order to satisfy the constituional requirements for liability articulated by this Court in *New York Times v. Sullivan*, such actions are all the more inappropriate for resolution on a motion for summary judgment.

2. Petitioners' theory of *New York Times v. Sullivan* would entail extending the already considerable substantive protections afforded libel defendants into the procedural summary judgment process of determining whether material facts are in dispute. This is patently incompatible with recent prior decisions of this Court to the effect that the constitutional guarantees embodied in First Amendment are to be given no weight in these kinds of purely procedural matters.

3. A number of important public interest considerations support the decision reached by the Court of Appeals. These include allowing public figures to have continued access to a jury trial so that they may freely engage in discussions about issues of public importance, and act to vindicate their reputations when unjustly defamed.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT IT IS INAPPROPRIATE FOR A TRIAL JUDGE TO APPLY THE CLEAR AND CONVINCING EVIDENCE CONSTITUTIONAL STANDARD AT THE SUMMARY JUDGMENT STAGE OF A PUBLIC FIGURE LIBEL ACTION

This case concerns the important legal issue of whether, in order to deny a defendant's motion for summary judgment in a public figure libel trial, a trial court judge is constitutionally compelled to conclude, not only that a reasonable jury could find the existence of actual malice, but that it could also find that the plaintiff had established actual malice with convincing clarity. As a practical matter, the question presented is much simpler: whether public figure libel plaintiffs seeking to redress perceived injury to their good names will remain entitled to have their claims fully adjudicated, where genuine factual disputes exist, by a jury. At a time when, owing to the substantive protections already afforded media defendants, the success rate for libel plaintiffs has been reduced to an abysmally low 5 to 10 percent (thereby making it the worst of all areas of personal injury law in which to litigate), failure to affirm to Court of Appeals ruling would strike a fatal blow to the already severely limited ability of public figures to vindicate their reputations. *See* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 Univ. San. Fran. L. Rev. 1, 4-5 (1983).

Traditionally, where facts have been found to be in dispute, courts have not hesitated to deny applications for summary judgment. In such instances, the summary judgment procedure has consistently and properly been viewed as infringing the Seventh Amendment right to trial by jury.[1] Adoption of Rule 56 of the Federal Rules of Proce-

[1] The Seventh Amendment provides in pertinent part that "the right of trial by jury shall be preserved."

dure has in no way altered judicial reluctance to constrict a party's right to have factually disputed issues resolved by a jury.

Judicial concern that trial by jury should not be replaced by "trial by affidavit" has been particularly acute in three key situations: (1) when the case involves questions of motive, intent or other states of mind; (2) when the credibility of the movant is attacked; and (3) when the moving party is in exclusive possession of the relevant facts.

Historically, these three situations frequently recur in libel litigation. Moreover, this Court's adoption of the actual malice standard of proof in *New York Times v. Sullivan* ensured that henceforth public figure libel litigation would necessarily involve searching examinations of a libel defendant's subjective state of mind. *Herbert v. Lando*, 441 U.S. 153 (1979).

Despite traditional judicial reluctance to grant summary judgment in cases involving state of mind determinations, the granting of summary judgments in post-*Sullivan* libel cases paradoxically soon came to be described as "the rule" rather than the exception. As a result, this Court felt constrained to remind the lower courts that libel cases were peculiarly suited to resolution through trial by jury. *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979).

Yet, despite the Court's clear admonishment, statistics confirm that judicial receptivity to summary disposition of libel actions continues unabated. *See, e.g.*, Libel Defense Resource Center, Study No. 6, Bulletin No. 12 (Dec. 31, 1984). The explanation for this phenomenon appears to be twofold: (1) a lingering concern that special summary procedures are necessary where first amendment values are implicated; and (2) the unthinking assumption that the substantive protections articulated in *New York Times* must automatically be extended to the summary judgment stage of public figure libel litigation.

The petitioners and their supporting amici now present these same two concerns. They call upon the Court to accept, and thereby institutionalize, the aberrant practice that has developed in the lower state and federal judiciary of blithely awarding summary judgments to media defendants. But neither tradition, past decisions of this Court, nor common sense support granting such sweeping procedural protections to libel defendants.

A. Summary Judgment Is Properly Regarded As A Procedural Remedy For Disposing Of Claims Which Should Be Sparingly Employed In Order To Avoid Depriving Litigants Of Their Seventh Amendment Right To A Jury Trial When Material Facts Are In Dispute

The summary judgment process outlined in Rule 56 of the Federal Rules of Civil Procedure has been described as being "a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact." 6 Moore's Federal Practice, para. 56.04 at 56-63 (2d ed. 1985). It provides that the trial court judge shall grant summary judgment if he finds there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The summary judgment rule serves a number of important functions. These include the avoidance of both costly trials, when only questions of law exist, as well as the danger that vexatious litigation may be used to coerce settlements. 10 C. Wright & A. Miller, *Federal Practice and Procedure*, Section 2712 at 370-77 (1973).

While the proper application of summary judgment operates to decide legal complaints efficiently by preventing unnecessary cases from going to trial, courts have been cautious in invoking it. Indeed, summary judgment has properly been classified as a "drastic remedy" to be sparingly employed, *Barber v. General Elec. Co.*, 648 F.2d

1272, 1276 n.1 (10th Cir. 1981); a "tool . . . as dangerous as it is valuable," *Applegate v. Top Assocs.*, 425 F.2d 92, 96 (2d Cir. 1980); and "a lethal weapon [of which] courts must . . . beware of overkill in its use." *Brunswick Corp. v. Vineberg*, 378 F.2d 605, 612 (5th Cir. 1967).

Once a motion for summary judgment is made the court must examine the record that exists at that preliminary point in the litigation in the light most favorable to the non-moving party in order to determine whether there are factual issues to be tried. 10 C. Wright & A. Miller, *supra*, Section 2727, at 524-28 (1973). If disputes over genuine issues of material fact are found to exist, the court must deny the motion. It cannot try issues of fact on the summary judgment motion as that would constitute an invasion of the jury's province. *See, e.g., Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434, 438 (3d Cir. 1973) (jury is allocated the task of weighing the contradictory evidence and inferences, of judging witness credibility, and of drawing ultimate conclusions as to questions of fact).

Judicial reluctance to involve Rule 56 derives from a justified fear of depriving litigants of their constitutional right under the Seventh Amendment to a jury trial. This Court, in particular, has repeatedly inveighed against using summary judgment procedures to cut off the right to jury trial when genuine issues of fact remain to be tried.

Thus, for example, in *Associated Press v. United States*, 326 U.S. 1, 6 (1945) the Court remarked: "We agree that Rule 56 should be cautiously invoked to the end that the parties may *always* be afforded a trial where there is a bona fide dispute of facts between them." (Emphasis added.)

An even stronger warning issued several years later in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962):

> It is only when the witnesses are present and subject to cross-examination that the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which for so long has been the hall-mark of "even handed justice".

Cf., Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 621-622 (1973) ("If this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment. . . .")

Clearly, then, the function of a trial court judge is circumscribed when considering a motion for summary judgment. Given that the nonmovant's Seventh Amendment right to a jury trial hangs in the balance, he must first examine the preliminary record that has been established in the light most favorable to the non-moving party. If a genuine issue of material fact is then found to exist, the motion must be denied and the case allowed to go to trial.

B. Summary Judgment Is Particularly Inappropriate For Resolution Of Cases Involving States of Mind

If, in the normal course of civil litigation, summary judgment is to be sparingly used, this is particularly true of cases which center around a party's state of mind. *See*, The Advisory Committee's Notes to Rule 56(e).

Causes of action which call into question a party's state of mind obviously involve an assessment of witness credibility. This, in turn, normally requires that the case be allowed to proceed to trial where the jury, by observing direct and cross-examination, will be able to assess properly that party's credibility. *Agosto v. INS*, 436 U.S. 748, 756 (1978) (it is solely within the purview of the jury to make a determination of credibility; a trial court may not grant summary judgment on its assessment of credibility.)

In other words, state of mind cases present questions of fact not susceptible to resolution at the summary judg-

ment stage where the record will consist entirely of pleadings, affidavits and other written documents. *Cf.*, 10 C. Wright & A. Miller, *supra*, Section 2726 at 524: Because "determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable men might differ—a function traditionally left to the jury—summary judgment often will be an inappropriate means of resolving an issue of this character." *Consolidated Elec. Co. v. United States*, 355 F.2d 437, 438 (9th Cir. 1966) ("when an issue requires determination of state of mind it is unusual that disposition may be made by summary judgment.")

This Court has similarly expressed an equally restrictive view of the appropriateness of granting summary judgment in state of mind cases. In *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401 (1899), a directed verdict case, the Court examined issues involving fraudulent intent. Because of the fundamental problem of witness credibility that was presented, it remarked:

> It may be said in general that there is no class of cases which are more peculiarly within the province of the jury than such as involve the existence of fraud. . . . [I]t is rarely safe to withdraw the question from the jury.

In *Poller v. CBS*, 368 U.S. 464 (1962), an antitrust case, the Court again reiterated this view:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Sonnentheil and *Poller* clearly stand for the proposition that summary judgment is improperly invoked in cases involving state of mind or where the facts in dispute are

particularly within the knowledge of the moving party. The reasons for this have been succinctly summed up by one commentator:

> Where a case is tried by affidavit and deposition, demeanor evidence is lost. The affiant, who in an ex parte affidavit may give a self-serving factual account, might under the formal pressures of trial be compelled to relate the truth. When summary judgment is granted this chance is lost.

Comment, *The Use of Summary Judgments in Defamation Cases*, 14 Univ. San Fran. L. Rev. 77, 84-85 (1979).

C. A Public Figure Libel Action Necessarily Requires A Searching Examination Into The Defendant's State Of Mind And Is Therefore An Inappropriate Area Of The Law For Summary Disposition

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court handed libel defendants "unquestionably the greatest victory won by defendants in the modern history of the law of torts," [2] when it held:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckeless disregard of whether it was false or not.

Id., at 279-80.

In addition to requiring a showing of actual malice, the Court also declared that this showing must be made with "convincing clarity" in order to sustain a finding of liability. 376 U.S. at 285-86. Both of these burdens, "actual malice," supported by "clear and convincing" evidence, were subsequently extended to public figure libel

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[2] W. Prosser, Handbook of the Law of Torts, Section 118, at 819 (4th ed. 1971).

plaintiffs. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

Because the actual malice standard calls into question the libel defendant's subjective attitude toward the truth or falsity of the published defamatory materials, it is clear that a public figure libel action centers upon that defendant's state of mind. *Herbert v. Lando*, 441 U.S. 153 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979).

In general, therefore, one would expect that consideration of a motion for summary judgment in the context of a public figure libel case involving the actual malice standard to be no different from any other type of civil litigation raising state of mind issues. Once the motion had been made, the court would examine the existing paper record in the light most favorable to the non-moving party, normally the public figure libel plaintiff. If genuine issues of material fact were found to be in dispute the case would be allowed to proceed to trial.

For the purposes of deciding what would be a disputed "material" fact in such a case, recourse would be had to the actual malice standard. Stated somewhat differently, any disputed fact determinative or bearing upon the question of whether the libel defendant "in fact, entertained serious doubts as to the truth of his publication" would be material. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The trial court would not, however, seek to assess or evaluate the weight of those disputed facts by, for example, determining if actual malice had been demonstrated with convincing clarity; that task would properly be left to the jury. Moreover, in light of the fact that in complex libel cases, as in complex antitrust cases, "motive and intent play leading roles, the proof is largely in the hands of the [defendants] and hostile witnesses thicken the plot," the court should be favorably predisposed to allowing the case to proceed to

trial. *Poller v. CBS*, 368 U.S. 464 (1962); *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979).

This is precisely the approach adopted by the Court of Appeals in the instant case. The lower court concluded that petitioners' motion for summary judgment should be denied because it found that: (1) the record disclosed material facts in dispute; and (2) a jury could reasonably conclude that nine of the thirty allegations contained in respondents' original complaint were defamatory false and made with actual malice. The lower court properly refused to invoke the clear and convincing evidence standard to evaluate the proof of actual malice. To do so, it correctly explained:

> would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts. . . . It would effectively force the plaintiff to try his entire case in pretrial affidavits and depositions . . . .

Liberty Lobby v. Anderson, 746 F.2d 1563, 1570 (D.C. Cir. 1984).

In short, the appellate court's concerns were the same as those expressed in the past by this Court regarding the use of summary judgment: that it should not be used as a means of replacing "trial by jury" with "trial by affidavit." Accordingly, the appellate court's decision should be affirmed.

D. Application Of The Clear And Convincing Evidence Standard At The Summary Judgment Stage Would Contravene This Court's Express Intent That No Special Procedural Protections Be Afforded Libel Defendants

Petitioners attempt to disguise the true nature of the extraordinary arguments they make by cloaking them in the familiar garb of *New York Times v. Sullivan*. Thus they begin with the well-settled proposition that a public

figure libel plaintiff must be able to demonstrate actual malice with convincing clarity in order to recover monetary damages at trial. Pet's Br. at 10-11.

From this, they next contend that the clear and convincing evidence requirement of actual malice mandated by *New York Times v. Sullivan* applies not only when the jury is actually conducting its deliberations but also when, at the close of the plaintiff's case, a motion for directed verdict is made under Rule 50. Pet's Br. at 12-13. Once again, this proposition is unassailable and was even recognized by the Court of Appeals. *Liberty Lobby v. Anderson*, 746 F.2d at 1571, *citing Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970).

However, petitioners then use these two principles to bolster the untenable claim that because the standard for summary judgment is similar to that for a directed verdict, the clear and convincing evidence standard also applies at the summary judgment stage. Pet. Br. at 13-16.

In contrast to petitioners novel and farfetched extension of the clear and convincing evidence standard, the actual jurisprudence reflects a recognition that it is improper for courts to usurp the prerogative of the jury by weighing evidence at the summary judgment stage. *See, e.g., Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974); *Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434 (3rd. Cir. 1973); *Kridler v. Bituminous Gas Corp.*, 409 F.2d 88, 91 (5th Cir. 1969); *M. C. Carlisle & Co. v. Cross*, 386 F.2d 672, 675 (1st Cir. 1967); *Monsanto Chem. Co. v. Payne*, 354 F.2d 965, 968 (5th Cir. 1966).

While a motion for summary judgment may be similar to a motion for directed verdict in that both seek to remove from the fact finder those cases in which there is no genuine controversy, such an indiscriminate view glosses over important differences. The motion for sum-

mary judgment is made at an early stage in the litigation when the record is not well developed. A directed verdict, on the other hand comes near the end of the case when the factual record is complete. The substantial difference in the development of the record is what makes it entirely appropriate for the trial judge to apply the substantive law at the directed verdict stage. The summary judgment stage however is entirely procedural. In fact Rule 56 says nothing about standards of proof at all. It is concerned purely with determining if there are material facts in dispute.

In *Calder v. Jones*, 104 S.Ct. 1482, 1488 (1984) this Court, acting unanimously, made clear its position about allowing "invisible radiations" from the First Amendment to impermissibly affect normal procedural mechanisms such as summary judgment:

> Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. See *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. *See, e.g., Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) (no First Amendment privilege bars inquiry into editorial process). *See also Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9, 99 S.Ct. 2675, 2680 n.9, 61 L.Ed.2d 411 (1979) (implying that no special rules apply for summary judgment).

II. IMPORTANT PUBLIC POLICY CONSIDERATIONS MILITATE AGAINST APPLYING THE CLEAR AND CONVINCING EVIDENCE STANDARD AT THE SUMMARY JUDGMENT STAGE OF A PUBLIC FIGURE LIBEL ACTION

Petitioners and their supporting amici contend that application of the clear and convincing evidence standard at the summary judgment stage would be in the public interest as it would prevent the alleged "chilling effect" on the media that they say the mere pendency of libel litigation poses. *See, e.g.*, Brief *Amicus Curiae* of American Newspaper Publishers Association, *et al.* at 21-28. They further argue that the adoption of such an extraordinary burden at this preliminary stage would be a means by which courts could prevent media harassment through the filing of meritless libel suits. *Id.*

However, no hard empirical evidence has been presented to the Court in support of these speculative contentions. Indeed as one commentator accurately noted: "Undoubtedly the term 'chilling effect' has been overused. . . . There is no conclusive evidence that the varying judicial interpretations of defamation have critically influenced editorial coverage of events and persons." Frakt, *Defamation Since* Gertz v. Robert Welch, Inc.: The *Emerging Common Law*, 10 Rut-Cam L.J. 519, 560 (1979). Moreover, courts are currently capable of employing much less sweeping devices to control and punish vexation litigation. For example, courts may impose sanctions for the filing of frivolous complaints and are also empowered to award attorneys fees and court costs for such harassing conduct. *See, e.g., F.D. Rich Co. v. United States* ex rel. *Industrial Lumber Co.*, 417 U.S. 116, 129 (1979).

Finally it is by no means clear that libel litigants are using this cause of action to harass or intimidate. A recently released study of all reported libel cases from 1974

to 1984 flatly concluded that: "libel plaintiffs are not litigious, for most plaintiffs this is the first time they have filed suit." Bezanson, Cranberg & Soloski, *Libel and the Press: Setting the Record Straight*, Silha Center for the Study of Media Ethics and Law (May 15, 1985). Portions of this study are reproduced in Appendix A to this brief. *See*, specifically, Appendix A at 8a.

Indeed, *amicus* believes that if this Court carefully weighs all the competing issues raised in this appeal it will conclude that the public interest dictates a conclusion entirely opposite from that propounded by petitioners. Incorporation of the clear and convincing evidence standard into the summary judgment phase of a public figure libel trial will effectively afford media defendants an absolute immunity to suit. It will concommittantly work to deprive a public figure libel plaintiff of the opportunity to secure even a partial vindication of his reputation when information has been published that is both false and defamatory, but not motivated by actual malice. Finally, imposing on the plaintiff the burden of establishing his case by clear and convincing evidence will disserve the public interest by deterring individuals from involving themselves either in government or from speaking out concerning matters of public interest and concern.

A. Application By Trial Judges Of The Clear And Convincing Evidence Standard At The Summary Judgment Stage Would Effectively Afford Defendants An Absolute Immunity To Suits By Public Figures Libel Plaintiffs

In *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979),[3] this Court examined and challenged the then-

[3] Petitioners consistently denounce the *Hutchinson* footnote as being mere dictum. But, as this Court is well aware, even dicta in a footnote may occasionally assume great precedential value. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

prevailing notion that "summary judgment" might well be "the rule rather than the exception" in cases raising the public figure actual malice issue:

> Considering the nuances of the issues raised here, we are constrained to express some doubts about the so-called "rule". The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and does not readily lend itself to summary disposition. *See* 10 *C. Wright & A. Miller, Federal Practice and Procedure* Section 2730, pp. 590-592 (1973). *Cf. Herbert v. Lando*, 441 U.S. 153 (1979).

The Court was correct to be concerned about the institutionalization of such a "rule" throughout the lower state and federal judiciary. In addition to upsetting long-standing principles about the propriety of allowing such state of mind questions to be resolved at trial, *supra* at 11-13, adherence to such a rule would be the functional equivalent, for all practical purposes, of granting libel defendants absolute immunity from suits involving public figures. Statistics bear this out.

Prior to *Hutchinson*, the libel defendants were successful in having the suits brought against them by public figures dismissed approximately 70% of the time. Somewhat surprisingly, that favorable success rate has risen to 76% in the years following the *Hutchinson* decision. Libel Defense Resource Center, Study No. 6, Bulletin No. 12 (Dec. 31, 1984). The reason for this is that the lower courts have consistently been applying the substantive constitutional protection embodied in the *New York Times* clear and convincing evidence standard when making procedural summary judgment determinations. *See, e.g., Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2nd Cir.), *cert. denied*, 449 U.S. 839 (1980).

It is of little value to potential public figure libel plaintiffs to be told that, in legal fact, the media are not

actually being afforded absolute immunity; that all they must do is show actual malice with convincing clarity in order to defeat a motion for summary judgment. The practical consequences are that a public figure plaintiff will almost never get his case before a jury. This is especially true if, as petitioners submit, all a libel defendant must do to make it impossible to prove actual malice with convincing clarity at the summary judgment stage is to submit a sworn affidavit saying he believed in the accuracy of what was published.

In this connection, it should not be overlooked that actual malice is only one of three important elements that a public figure libel plaintiff must establish in order to obtain a favorable verdict trial. The other two elements—that the published statement was defamatory and that it was false—stand independently of the constitutional requirement that actual malice be proven with convincing clarity. Placed in its proper perspective, the actual malice requirement is merely the final requirement prerequisite to an award of monetary damages. Yet winning on these other two elements at trial clearly performs a vindicatory function and can be even more rewarding to a libel defendant than money. *See, e.g., Sharon v. Time, Inc.*, No. 83 Civ. 4660 (S.D.N.Y.). Indeed, according to one recently released academic report: "libel plaintiffs do not sue in order to win money damages, rather they sue to restore their reputations or to punish the media [for injuring their reputation]." Bezanson, Cranberg, Soloski, *Libel and the Press: Setting the Record Straight*, Silha Center for the Study of Media Ethics and Law (May 15, 1985). *See*, Appendix A to this brief at 8a.

It is not at all clear who has the burden of proof in establishing these two other elements or that the Constitution also mandates the extraordinary clear and convincing evidence standard for each. However were this Court to accept petitioners' arguments, these elements would likewise be subsumed in that standard and dis-

missed at the pretrial stage simply because actual malice could not be shown by the plaintiffs with convincing clarity.

Such a result would be entirely contrary to statements by this Court in nearly all of its major libel decisions to the effect that reputational rights are valuable and worthy of vindication. It would be contrary to the public interest in allowing public as well as private figures the opportunity to vindicate their reputations in court. As Justice Fortus so eloquently said:

> The First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season. The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law.

St. Amant v. Thompson, 390 U.S. 727, 734 (Fortas, J., dissenting).

A recently released study by the Silha Center for the Study of Media Ethics and Law School of Journalism and Mass Communication at the University of Minnesota supports *amicus'* contention that most public figure libel plaintiffs sue to vindicate their reputation rather than for the monetary awards that are theoretically available to them should they prove actual malice with convincing clarity. *See* Appendix A to this brief at 7a. Accordingly, public interest considerations dictate that this Court should deny the near absolute immunity rule surreptitiously being propounded by petitioners.

B. Individuals Will Be Deterred From Entering Public Office, Involving Themselves In Public Affairs, Or Speaking Out On Matters Of Public Importance If, Through The Application Of The Clear And Convincing Evidence Standard At The Summary Judgment Stage Of A Libel Suit, They Are Effectively Deprived Of Any Means To Vindicate Their Reputations Before A Jury

The sanctioning by this Court of the current judicial practice of burdening public figure libel plaintiffs with the clear and convincing evidence standard would be tantamount to affording libel defendants an absolute immunity. This, in turn, would deter individuals from engaging in public affairs or from exercising their First Amendment right to speak out on matters of public importance.

In an original study published by the American Legal Foundation, the argument was made that the *New York Times* actual malice doctrine may be having the perverse effect of actually encouraging persons to attack the reputations of public officials and public figures through the dissemination of defamatory falsehoods. This consequently works to obstruct the ability of the government to recruit talented individuals to elective office. B. Fein, New York Times v. Sullivan: *An Obstacle to Enlightened Public Discourse and Government Responsiveness to the People.* (American Legal Foundation, No. 1, 1984).

The same arguments are equally valid when applied to the question of whether the convincing clarity evidential standard should be required at the summary judgment stage. If the actual malice standard paradoxically encourages character assassination and makes it all but impossible to succeed at trial, *a fortiori* then, insulating libel defendants even further from the mere potential *threat* of potential liability at trial will result in a worsening of this situation.

This necessarily would result in chilling in the legitimate exercise of a public figure's First Amendment rights. For as one commentator has explained:

> [T]he utilization of a liberal summary judgment rule may inhibit public figures from expressing their views on important issues. Unless public figures are assured a viable judicial remedy, they may hesitate or refuse to speak out on controversial issues likely to attract attention or draw fire from the media. As a result, not only are the first amendment rights of public figures abridged, but also the "uninhibited, robust, and wide open" public debate which *New York Times* sought to encourage is effectively reduced. In this sense, the first amendment argument so ardently advanced by proponents of the liberal rule is a double-edged sword.

Ligansky, *Summary Judgment in Defamation Actions: A Threat to the Substantive Rights of Public Figure Plaintiffs*, 3 Cardozo L. Rev. 105, 125 (1981) (footnote omitted).

CONCLUSION

For all of the foregoing reasons, this Court should affirm the United States Court of Appeals for the District of Columbia's holding that the clear and convincing evidence standard is inapplicable at the summary judgment stage of a public figure libel suit.

Respectfully submitted,

DANIEL J. POPEO *
MICHAEL P. MCDONALD
AMERICAN LEGAL FOUNDATION
1705 N Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 857-0400
Attorneys for Amicus Curiae
American Legal Foundation

* Counsel of Record

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APPENDIX

APPENDIX

The 1985 Silha Lecture
University of Minnesota
May 15, 1985

LIBEL AND THE PRESS
Setting the Record Straight *

Randall P. Bezanson
University of Iowa

Gilbert Cranberg
University of Iowa

John Soloski
University of Iowa

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Randall P. Bezanson, Gilbert Cranberg, and John Soloski

Silha Center for the Study of Media Ethics and Law
School of Journalism and Mass Communication
University of Minnesota
111 Murphy Hall, 206 Church Street SE
Minneapolis, Minnesota 55455-0418

The Study

Considering the amount of coverage libel suits have received in the popular media and the amount of time spent discussing the problem of libel at professional meetings, it is surprising that we know next to nothing about libel plaintiffs and the reasons they sue. To remedy this, we collected data from six sources: (1) an in-depth study

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* Although the complete report runs to 35 pages, it has been abridged in the interest of judicial economy. The instant Appendix consists of only pages 4 through 11 which summarize the major findings contained in the Report.

of all reported defamation and privacy cases decided between 1974 and 1984; (2) a detailed survey of libel plaintiffs; (3) a detailed study of media defendants; (4) a series of in-depth interviews conducted at selected media organizations; (5) a series of in-depth interviews with attorneys who represent media organizations; and (6) a survey of attorneys who have represented libel plaintiffs. Due to time limitations, we will concentrate on the plaintiff and defendant surveys and on our study of defamation and privacy cases decided between 1974 and 1984.

Defamation and Privacy Cases

The first data set is composed of all defamation and privacy cases reported between *Gertz v Welch* in 1974 and mid-1984. All cases were included in which libel or invasion of privacy was a cause of action, and included both media and non-media defendants. In all, nearly 900 cases were identified, coded and entered into a computerized data base. Although this data set does contain privacy cases, we will deal only with defamation cases in our presentation. Some of the key findings we have been able to cull from these data are:

—about seven of every 10 libel cases involve members of the news media.

—over half of the libel cases involving the media are the result of stories that deal with the plaintiffs' business or professional activities.

—less than a fifth of the libel cases involving the media are the result of stories that focus on the plaintiffs' moral conduct.

—individuals who are public figures or public officials are the plaintiffs in about 55 percent of the libel cases against the media.

—the constitutional privilege of negligence or malice is the central legal issue in nearly 90 percent of the libel cases brought against the media.

—plaintiffs win only 10 percent of the cases, while the media win 90 percent of the cases.

Based on our study of defamation cases, we can say that the typical libel case involving the media is brought by a public figure or public official; that the alleged libelous story deals with the plaintiff's business or professional activity; that the main legal argument focuses on the media's negligence or malice in reporting the story; and the libel plaintiff has no more than a one in 10 chance of winning his or her suit.

The Plaintiffs

In discussing the results of the survey of libel plaintiffs, we will offer only general conclusions because we are just beginning a second set of interviews. Obtaining the cooperation of libel plaintiffs was the single most difficult task of the entire study. Not surprisingly, libel plaintiffs are often reluctant to answer personal questions about their experiences and, in some cases, their attorneys recommended that they not participate in our study. Despite the difficulty of obtaining interviews, we did manage to complete interviews with 114 plaintiffs who had sued the mass media for libel. Some of the key findings obtained from the survey are:

—unlike other civil torts, individuals and not organizations account for most of the libel suits brought against the media.

—most libel plaintiffs are between the ages of 36 and 64.

—most libel plaintiffs are well-educated, with about a third holding graduate or professional degrees.

—most libel plaintiffs are well-off financially, with more than a third having incomes greater than $50,000 a year.

—most libel plaintiffs are well-established members of their communities; more than half have lived in their communities more than 30 years.

—most libel plaintiffs are highly visible members of their communities.

—libel plaintiffs tend to be employed in law enforcement, as non-elected public officials, as elected public officials, or as professionals.

—for most liberal [sic] plaintiffs, their libel suit represents the only time that they have filed suit. Only a small percentage of libel plaintiffs reported that they had been involved in other suits against the media.

The data about libel plaintiffs tell us that the typical libel plaintiff is a well-educated, middle-age male who earns a substantial income. In addition, the typical libel plaintiff is a long-time resident of his community, and he is a highly-visible member of his community. And the typical libel plaintiff is either an elected official, works as a professional or works in law enforcement.

The Libel

Despite being outnumbered by nearly six to one by broadcasting stations, daily newspapers are the medium most often sued for libel. We found that newspapers were sued in over two-thirds of the cases, while broadcasters were sued in less than 15 percent of the cases. Contrary to the popular myth that says libel suits are the result of hard-hitting, investigative news stories that run on front pages under banner headlines, we found that most libel suits do not involve front page stories. Only about 40 percent of the libel suits we studied were the result of stories that appeared on the front page of a newspaper.

One editor we interviewed summed up this finding quite nicely: "Investigative stories are done with great care and are not nearly as troubling as the stories that appear on the inside of the paper. It's the routine stories that rise up and bite you in the ass." We did find that libel suits involving front page stories tend to be brought by plaintiffs who hold elected or non-elected public office or by professionals. Stories that appear on inside pages result in libel suits tend to be brought by business owners and managers or by white-collar employees.

When a plaintiff is a public official or public figure, the allegedly libelous story tends to focus on his or her public or political activities. When a plaintiff is a private individual, the allegedly libelous story deals with his or her criminal activities or with his or her public activities. Specifically, plaintiffs who are elected officials sue over stories that deal with their public or political activities. Plaintiffs who are employed in law enforcement or who hold non-elected public office sue over stories that focus on their public or political activities. And plaintiffs who are employed in business sue over stories that deal with their business or professional activities. But when plaintiffs are employed as professionals, the allegedly libelous story deals either with their public or political activities or with their business or professional activities.

We found that there is a strong correlation between a plaintiff's community visibility and the content of the alleged libelous story. The higher a plaintiff's community visibility, the greater the likelihood that the alleged libel will deal with his or her public or political activities. The lower a plaintiff's community visibility, the greater the likelihood that the allegedly libelous story will deal with his or her business or professional activities.

What is it about the allegedly libelous story that most upset plaintiffs? The vast majority of the plaintiffs we interviewed said that what upset them most about the alleged libelous story was that it was false. Plaintiffs

who are highly visible members of their communities are more likely to state their concerns in terms of falsity, while plaintiffs with low community visibility are likely to state their concerns in terms of reputational harm.

How are libel plaintiffs harmed by the allegedly libelous story? Most libel plaintiffs say that the alleged libel caused them emotional harm. Specifically, libel plaintiffs who are elected officials are likely to say that they suffered emotional harm or damage to their political status. Plaintiffs who work in law enforcement or who hold non-elected public office are likely to say that they suffered emotional harm. Even plaintiffs who work as professionals tend to claim that they suffered emotional harm. The only plaintiffs who are likely to say that they suffered financial loss because of the alleged libel are business owners and managers.

What do libel plaintiffs do after the alleged libelous story is published? Contrary to the opinion of some members of the media, libel plaintiffs do not rush to an attorney in order to sue for libel. Rather the majority of plaintiffs rush to the media and only after dealing directly with the media do they contact an attorney. Plaintiffs who are in the public eye are the most likely to contact the media before contacting an attorney. Specifically, plaintiffs who are elected public officials or who work as professionals are likely to contact the media before they contact an attorney. On the other hand, plaintiffs who work in business are more likely to contact an attorney instead of the media. And what do plaintiffs ask the media to do? Almost all plaintiffs ask the media to run a retraction, correction or apology.

As would be expected, the media turn down most of the plaintiffs. And it is then that the plaintiffs contact an attorney. About half of the plaintiffs contact an attorney to obtain advice on what to do next, but the other half of the plaintiffs contact an attorney with the specific purpose of suing the media for libel. The plaintiffs who are the

most likely to contact an attorney having already made up their minds to sue are those plaintiffs who contacted the media first. Plaintiffs who are in the public eye are the most committed to suing for libel. But these are the same plaintiffs who will contact the media about the allegedly libelous story before they contact an attorney. It is interesting to note these plaintiffs are the most likely to say that they were very angry and upset by their contact with the media.

Why, then, do plaintiffs sue for libel? Do plaintiffs see their libel suit as an opportunity to profit by winning large damage awards? In short, the answer is no. Most plaintiffs said that they sued in order to punish the media and to restore their reputations. Only about a quarter of the plaintiffs said that they sued to win money damages.

It seems to us that a number of valuable findings can be derived from the data we have collected from libel plaintiffs.

Some of the more pertinent findings are:

—libel plaintiffs are important members of their communities who hold jobs of great responsibility.

—libel plaintiffs hold jobs that place them in the public eye. The ability of plaintiffs to successfully perform their jobs is related to the plaintiffs' reputation in the community.

—libel plaintiffs perceive the alleged libel as a direct threat to their positions within the community.

—libel plaintiffs defend themselves by claiming that the allegedly libelous story was false.

—libel plaintiffs do not suffer financial loss because of the alleged libel, rather they claim that the libel causes them emotional suffering.

—libel plaintiffs tend to contact the media about the alleged libel before they contact their attorney.

—libel plaintiffs do not sue in order to win money damages, rather they sue to restore their reputations or to punish the media.

—libel plaintiffs are not litigious, for most plaintiffs, this is the first and only time they have filed suit.